

Enforcement in Transition

Deterrence has worked well to achieve compliance with regulatory mandates, but by itself is no longer the best route to continued improvement in environmental performance. Fortunately, a new approach is already emerging

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The use of enforcement authority to ensure compliance with environmental statutes is one of the most important aspects of the current national dialogue about the scope of government regulation and the future "of ecological protection. One of the most visible aspects of government's using its power to bring about compliance, it is also one of the most contentious, as illustrated by the attempt by the House of Representatives to limit EPA enforcement authority by attaching several riders to the agency's appropriations bill last summer. But enforcement is moving beyond its adversarial and antagonistic beginnings. For the past several years, practitioners of environmental enforcement, from Washington to state capitals to city halls, have begun to transform their philosophy and methods, redefining the roles of government, business; and the public in ensuring environmental compliance and thereby improving environmental protection.

Over the last quarter century, enforcement based on deterrence has been a critical factor in motivating business toward environmentally responsible behavior. Through rigorous inspection, detection of violations, and the resulting sanctions and penalties, companies are forced to correct violations and discouraged from future noncompliance. Under the deterrence approach, it is assumed that the more inspections conducted and enforcement actions taken, the greater the deterrent effect and the higher the level of both compliance and the environmental protection that is its goal.

The "outputs" of the deterrence approach can be conveniently tallied to provide a sense of enforcement activity. For example, in fiscal year 1994, EPA brought a total of 2,246 enforcement actions, consisting of 220 criminal cases, 1,596 administrative penalty actions, and 430 judicial civil referrals to the Depart-

ment of Justice. Penalties from these actions totalled \$151 million, and injunctive relief and additional environmentally beneficial projects performed in exchange for penalty reductions totalled \$740 million. At the state level, environmental agencies issued 11,334 enforcement actions in the same year.

This level of deterrence-based enforcement activity has provided a strong source of motivation for regulated entities. Fear of enforcement action and its attendant public embarrassment has caused many companies and facilities to move into compliance. Deterrence has prevented many noncomplying parties from gaining an unfair competitive advantage over those who comply. And it has helped drive the application of technologies that can improve business performance and profitability. Deterrence will always have an important role in environmental protection.

But when used as the predominant or exclusive approach to ensuring compliance, deterrence has several serious shortcomings. First, the definition of success tends to devolve to counting activities (the number of enforcement actions taken or penalty dollars collected). This measure reveals little, if anything, about the actual state of compliance or even the actual impact of enforcement actions, much less the state of the environment. Second, the problem of defining success leads squarely to confusion over ends and means. Racking up increasing numbers of enforcement actions tends to become the mission of deterrence instead of a means to achieving the larger ends of compliance and environmental protection. Third, deterrence is largely reactive, identifying violations after they occur and preventing them only as a by-product rather than through proactive efforts to prevent them from occurring in the first place. Fourth, deterrence focuses largely on punishing violators and not on enhancing or rewarding voluntary compliance. Last, the

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deterrence approach has come under increasing strain as both the number of environmental requirements and the number of regulated entities subject to them continue to grow, while the resources available to assure compliance through enforcement actions continue to shrink. This widening gap between government's compliance assurance mandate and the resources it can apply to it means there will simply never be enough inspectors and government attorneys to achieve significant levels of compliance through enforcement actions alone.

Many environmental agencies have already acknowledged these shortcomings. While recognizing the success of deterrence and the continuing role it will play, they have begun to question old assumptions, develop supplements or alternatives, and identify new tactics. They are defining a "new approach"—for lack of a better name—to compliance that has five distinct elements: rethinking and revising their mission; changing their relationship with regulated entities and the public; shifting strategic assumptions; implementing new ideas about targets and tactics; and developing new measures of performance.

A broader mission. Rather than merely fostering production of increasing numbers of enforcement actions, this new approach fosters accountability toward environmental obligations rather than just toward regulatory obligations. Using this concept of "environmental accountability," industry's compliance with legal requirements, its acceptance of the moral obligation to go beyond compliance to protect the environment, and its application of environmentally and economically beneficial business practices are "enforced" by the combined efforts of government, the public, and business itself. Environmental accountability frees compliance organizations to develop and use a wider range of tools. It ends the confusion over means and ends that pervades the deterrence approach—enforcement becomes but one of several tools to achieve the larger goal of environmental protection.

A set of new relationships. Under deterrence, the relationship between government and industry was adversarial and arms-length. In order to preserve their authority to apply the law and impose sanctions in a systematic and uncompromising fashion, agencies largely

walled themselves off from cooperative efforts to promote compliance. In an attempt to remain fair and impartial, agencies also stayed aloof from the larger public.

Under the new approach, both industry and the public become a resource that can serve the broadened mission of environmental accountability. In particular, agencies are realizing the potential power of enlisting the public and appropriate segments of the regulated community in ensuring compliance and promoting behavior that goes beyond.

Shifts in strategic assumptions. There are three key strategic assumptions about enforcement that are shifting in environmental agencies. First, these agencies now recognize that complete coverage of the regulated universe and "uniform enforcement of the law" are unattainable ideals, invalid assumptions on which to build a meaningful compliance strategy. This recognition is based both on acknowledged resource constraints faced by agencies and the growing sense that complete coverage and uniform enforcement can divert such organizations from focusing on more critical environmental problems or patterns of noncompliance. Environmental accountability places greater emphasis on setting priorities and directing governmental resources toward the problems of greatest concern.

The second shift in assumptions is the movement toward a problem-oriented view of compliance work—in other words, a move away from an incident-by-incident, case-by-case system. In his book *Imposing Duties: Government's Changing Approach to Compliance*, Malcolm Sparrow of Harvard University describes this as a shift in which the "unit of work" changes from routine processing of cases to interventions designed to address problems. Agencies instead identify environmental or human health risks, analyze the underlying causes of noncompliance, and apply the appropriate tools to the problem.

The third shift is the movement from dealing with single media and single pollutants to a multi-media, multi-pollutant program. For example, instead of targeting violations of clean air requirements, the new approach targets industry sectors, communities, or geographic areas, seeking compliance with the full range of environmental requirements that apply.

A more diverse mix of tactics. This includes compliance assistance to prevent violations,

compliance incentive programs to encourage and facilitate responsible behavior, programs to recognize excellence in environmental management, and affirmative use of compliance data to inform the public about environmental performance of companies or facilities. The use of a more diverse mix of tactics means that a significant new task of environmental agencies is matching the appropriate tool or combination of tools to each problem.

Agencies experimenting with the new approach recognize that maintaining enforcement capacity is very important to the future success of their compliance program. Deterrence will remain a major tool in the effort to achieve environmental accountability, and there will always be a segment of the regulated universe that will lack the will to comply and only do so through enforcement action. But a likely consequence of the new approach is that it will change the nature of environmental enforcement actions. The targets and purposes of those actions will reflect the problem-oriented focus and other changes in strategic assumptions. Maintaining an enforcement capacity that can mobilize to address a wider range of problems will be crucial to that success.

More sophisticated measures of effectiveness. What does an increase in actions taken and dollars collected mean? Is it good news (the government was able to identify and punish a higher percentage of noncompliance)? Or is it bad (noncompliance is increasing)? There is a paradox in counting as a "success" an enforcement action that penalizes and returns to compliance a facility that has been a failure in living up to its obligations. Under the new approach, agencies are finding measures that reflect the level of compliance among sectors of the regulated universe and characterize the environmental improvements and benefits resulting from compliance.

Environmental compliance organizations at the federal, state, and local level are beginning to put in practice many of these elements. Implementation will begin with policy changes, reinvention initiatives, and reorganizations in specific agencies. EPA will need to serve as both leader and facilitator for implementing the new approach by initiating changes in its own compliance program, promoting such changes in state and local programs, and by evaluating effectiveness and communicating successes to agencies at all levels of government.

EPA's own enforcement reorganization, the Massachusetts Waste Prevention FIRST program, and the Santa Rosa Compliance Incentives Program provide examples of three agencies now implementing some or all of the elements of the new approach.

At the federal level, EPA completed a reorganization of its enforcement program in 1994, consolidating the agency's five enforcement and compliance programs under one assistant administrator for enforcement and compliance assurance—a new "strategic enforcement organization." The result went beyond a structural change to a change in EPA's strategy and tactics for environmental enforcement.

In a 1993 memo announcing the reorganization, the agency offered several operating principles:

- Although an imposing enforcement presence must be maintained, traditional enforcement should be seen as a tool for achieving the broader goal of compliance and not as an end;

- To be most effective in measuring compliance and targeting enforcement resources, enforcement strategies should increasingly be built around "sectors" of the economy; and

- Multi-media, whole-facility tactics represent the future of environmental protection and should be pursued wherever appropriate.

Since EPA established the Office of Enforcement and Compliance Assurance in June 1994, many of the concepts of the new approach have been translated into action.

The office has developed problem-oriented compliance priorities based on environmental or human health risks, noncompliance patterns associated with industry sectors, communities, and other geographic areas, and medium-specific issues. These na-



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tional priorities will direct EPA's compliance assurance program for the first time in fiscal year 1996.

Last April, EPA launched the Environmental Leadership Program in cooperation with 12 facilities that will serve as pilot projects to define an excellence threshold for environmental management. Participating companies will receive public recognition and a period to correct violations. After the pilot phase, the agency will expand participation to other facilities that can meet the threshold. The pilot facilities will establish standards for facility programs to ensure compliance with legal requirements; for environmental management systems that identify and address problems beyond those required by law; for disclosure of environmental audit findings; for third party verification regarding performance of facility environmental policies; for enforcement response incentives such as deferral of enforcement during a correction period for violations; and for using environmental leaders as mentors for less sophisticated facilities and providing recognition for those mentors.

Also in April, the agency set forth incentives for environmental auditing in its new Self-Disclosure Incentives Policy. The incentives are for companies that conduct internal self-evaluations, and then act on the findings by voluntarily disclosing and promptly correcting violations. EPA will eliminate the gravity, or "punitive," element of the penalty for companies that find, disclose, and fix violations and reduce criminal liability for these companies.

In May, EPA expanded the policy regarding environmentally beneficial projects that can be performed by businesses in exchange for penalty reductions. It revised the Supplemental Environmental Projects policy, which governs the acceptance and implementation of these projects as part of an enforcement settlement, to promote their wider use, especially when they result in pollution prevention projects.

In June, EPA issued a new Policy on Compliance Incentives for Small Business. The new policy states that EPA will exercise its discretion to refrain from initiating an enforcement action seeking civil penalties, or to mitigate or waive civil penalties, whenever a small business makes a good faith effort to comply with environmental requirements by

receiving compliance assistance, where there is no criminal behavior and no significant environmental or health threat, and when the business corrects the violation within a specified correction period.

A number of other activities have been of help in making the enforcement reorganization have real meaning and effect. The agency has fostered increased understanding about environmental management in industry sectors through cooperative efforts with those industries. It developed 18 profiles of specific sectors, and each includes information on the environmental problems, regulatory requirements, compliance assistance needs, non-compliance patterns, manufacturing processes, and pollution prevention opportunities.

In addition, the agency has produced new compliance assistance materials and delivery systems. EPA is establishing compliance assistance service centers for specific industries. These centers will offer "plain English" guides about compliance requirements, technical assistance, and training to maximize use of pollution prevention technologies and state-of-the-art auditing protocols and consolidated reporting programs.

The agency is also starting a pilot project to provide public access to EPA's integrated enforcement data system. The program works with selected groups to broaden access to information about past compliance performance of companies and facilities, thereby providing the public with a powerful tool they can use to promote environmental accountability.

Last, the agency is creating new measures of success, supplemented by traditional data about enforcement. The new measures emphasize the actual impact of activities designed to ensure compliance. For example, compliance rates for industry sectors are being developed by re-engineering and integrating existing single-medium data systems to produce multi-media compliance information for whole facilities and industries. EPA will collect the environmental "results," such as reduced emissions, due to enforcement actions, for every completed case. It will compile and analyze this information to identify where to achieve the greatest environmental benefits in the future. Also, the agency will collect information about the impact of compliance assistance activities to measure improved understanding of regulatory requirements and behavioral changes at facilities, the percentage of facilities being reached by

compliance assistance, and the increases in compliance rates from targeted assistance.

These activities add up to more than bureaucratic process. They constitute the genuine emergence of a new national approach to compliance with federal environmental statutes.

At the state level, the Massachusetts Department of Environmental Protection launched a comprehensive review and assessment of its compliance and enforcement effort in 1988. While recognizing that pollution control and clean-up are necessary for environmental protection, DEP had determined to shift its focus to prevention and preservation. The department recognized a "compliance triad," a range of approaches to encourage changes in human and corporate behavior and ensure compliance with state environmental rules: Fret, promotion of compliance using education and outreach, technical assistance, and economic incentives. Second, monitoring compliance through inspections, self-reporting, and response to complaints. Third, enforcement through issuance of notices of noncompliance, negotiated consent decrees, or administrative orders.

The results of DEP's blending of the pollution prevention ethic and the range of approaches in the compliance triad is its program known as Waste Prevention Facility-wide Inspection to Reduce Sources of Toxics—"Waste Prevention FIRST." The program is based on the idea that the effectiveness of traditional compliance and enforcement tools can be enhanced by inspecting whole facilities instead of individual waste streams.

The program conducts air, water, and hazardous waste inspections simultaneously, instead of one at a time, and then points companies in the direction of toxics use reduction, taking advantage of a state law that mandates such plans. The program provides significant efficiencies for traditional compliance and enforcement activities. For example, the 700 whole-facility inspections conducted in 1993 would have required 2,992 visits to accomplish the same amount of work done in the conventional single-medium way. In addition, the program also provides resources (through referrals to the state's Office of Technical Assistance) to help violators not only come back into compliance, but go beyond it to achieve meaningful and cost-saving reductions in their chemical use and emissions.

By developing multi-media inspection capabilities, offering compliance assistance to regulated entities, and pursuing a whole-facility approach to environmental compliance, Massachusetts has been a pioneer in redefining its environmental mission, strategic assumptions, and mix of tactics.

An interesting example of a local government implementing elements of the new approach to environmental compliance is the Compliance Incentives Program of the City of Santa Rosa and Sonoma County, California. The program was initiated to make it simpler and more rewarding for small businesses (particularly the vehicle service industry) to comply with environmental regulations.

The program followed a one-year investigation of high levels of noxious fumes in a sewer trunk line serving an area in which many auto dealers and repair shops are located. Auto shop owners felt that regulations from the eight county organizations responsible for environmental compliance were unclear and conflicting. There was little communication between regulatory agencies, and information on how to comply with all requirements was not readily accessible. Businesses were increasingly frustrated by the regulators' use of fines and penalties in the absence of clear guidance.

The Compliance Incentives Program uses a combination of technical assistance, multi-media regulatory streamlining, public recognition, and enforcement action. The eight agencies formed an interagency group to develop a streamlined multi-media inspection checklist. When a company signs up for the program, it receives an information kit detailing best environmental management practices for auto service and repair shops, provides a facility with a self-inspection checklist for all environmental requirements, and a vendor list for equipment and services that



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could help the facility comply. Participating shops are inspected by just one of the agencies with environmental responsibilities, and these inspectors are trained to conduct multimedia inspections. On the initial inspection, violations are identified and companies are offered guidance about how to comply, and if the follow-up inspection finds them in compliance they are awarded a Sonoma Green Business sticker. The county publicized the program to make consumers aware of which facilities are in compliance, encouraging them to do business with those facilities.

Since the first stickers were awarded in March 1994, it is too early to make conclusive judgments about the effectiveness of the program, but indications are very promising. Before the program, inspections found no auto shops in full compliance with environmental requirements. Since it began, more than 100 shops have requested voluntary inspections. Of these, only 3 percent were found to be in compliance on the first inspection, but this increased to 70 percent on the follow-up. Shop owners are happier with the compliance assistance now offered by their local governments. Consumers are being surveyed to determine whether the program has influenced their choice of repair shop.

Over the past 25 years, the deterrence approach has brought credibility to environmental requirements, provided motivation for companies to invest in compliance, and has prevented many non-complying parties from gaining an unfair competitive advantage over those who comply. But if agencies are to contribute fully to environmental quality in the next 25 years, they will need to use a mix of tactics to prevent noncompliance, offer incentives or recognition as a way to promote compliance, impose sanctions and penalties when necessary, and enlist the public and the regulated universe in the cause of environmental accountability.

Several challenges will confront agencies in moving toward the new approach. First, identifying and assessing environmental and noncompliance problems will require deeper and more sophisticated analytic capacity (for example, the ability to assess and compare environmental risks) than is currently found in most of these organizations. Second, developing and using an expanded mix of tactics and tools will demand new capabilities, such

as communication and outreach skills for compliance assistance. It will also require a willingness to apply enforcement authorities in creative ways that offer incentives and rewards for compliance. In addition, if new tools are to be used most effectively, their impact will need to be evaluated and their use refined as more is learned about them.

Another challenge will be the need for agencies to be more adaptable and flexible. With emphasis on solving problems rather than conducting actions, they are likely to face a more diverse set of responsibilities. In a given period, priorities might include a few selected industry sectors, a set of ecosystems or air basins, a number of new or emerging medium-specific requirements, and some previously under-protected communities bearing a disproportionate share of pollution risks. Addressing these varied problems and applying a mix of tools to them will require a significant degree of organizational dexterity. The last challenge will be to break free of the single-medium perspective that shaped the first quarter century of environmental protection without abandoning it when circumstances deem it appropriate.

The new approach described in this article has been informed by the successes and failures of the first 25 years. Its hallmark will be environmental accountability brought about by the combined efforts of government, business, and the public. Government's role will be to target significant problems, apply the appropriate mix of tools to those problems, and measure the results of those efforts. Industry's role will be to meet legal requirements and moral obligations to protect the environment, and facilitate excellent environmental management performance by using the best companies as benchmarks and models from which others can learn. The public's role will be to use its right to know as a tool to motivate industry and government.

The public dialogue about the role of government and the nation's approach to environmental protection will continue. A more intelligent and effective model of environmental protection needs to emerge from that dialogue, one that includes new approaches based on a reasoned analysis of the successes and failures of the first quarter century of government's efforts to protect the environment. Although all the elements of that new model are not yet apparent, it is clear that the movement toward a new approach to environmental compliance is well under way.